No. 21080

United States
COURT OF APPEALS
for the Ninth Circuit

PACIFIC INLAND NAVIGATION COMPANY, a corporation,

Appellant-Cross-Appellee,

v.

DELBERT A. COURSE,

Appellee-Cross-Appellant.

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY

APPELLANT'S REPLY BRIEF

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Appellant reaffirms its position that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq,* is the exclusive remedy of a shorebased employee against his employer-shipowner for injuries sustained upon his employer's vessel.

EXCLUSIVE LIABILITY PROVISION OF THE ACT HAS NOT BEEN ABROGATED

In order to maintain his position in the case at bar, appellee is forced to the argument that *Reed* v. *SS YAKA,* 373 U.S. 410 (1963) abrogated the *exclusiveness of liability* of the Longshoremen's Act and the appellee's remedies against his employer are no longer limited by the plain language of the statute. It becomes immediately patent that appellee's position is untenable when the decision in *Reed* v. *SS YAKA* is properly analyzed.

For its decision in *Reed* v. *SS YAKA,* the majority of the Court relied upon its prior holdings in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), and *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.,* 350 U.S. 124 (1956). In *Sieracki, supra,* the Court held that the warranty of seaworthiness owed by a vesselowner to a seaman extended to a longshoreman in the face of the argument that section 905 of the Act limited the longshoremen to compensation. The Court said, at page 101:

> ". . . In other words, it is claimed that the remedies afforded by the longshoremen's legislation are exclusive of all other remedies for injuries incurred aboard ship, whether against the employer or others . . ."

The Court concluded that such a contention had no merit. It reasoned that Congress did not purport to limit the longshoremen's remedies against others who were not his employer. The Court continued, at page 102:

> "We may take it therefore that Congress intend-

ed the remedy of compensation to be exclusive against the employer. See *Swanson* vs. *Marra Bros., Inc.,* . . . decided this day, 328 U.S. 1. But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against third persons. Exactly the opposite is true. The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except in the instance, presumably rare, where he may be hired by the owner."

Language of like effect is found in *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp., supra,* at page 131:

"The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. A third party complaint is grounded upon the contractor's breach of its purely consensual obligation *owing to a shipowner* to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not barred by the Compensation Act."

In light of the fact that the Court drew upon the teachings and limitations expressed in *Sieracki* and *Ryan,* it would seem strange indeed to conclude that the holding is inconsistent with the concept of *exclusiveness of liability* which was reaffirmed in those two cases, or that either of the three cases expresses a point of view foreign to the language of the statute.

In *Italia Societa Per Azioni di Navigazione* v. *Oregon Stevedoring Company, Inc.,* 376 U.S. 315 (1963), the Supreme Court made clear that its decision in *Reed* v.

SS YAKA, supra, did not change the rule that the Longshoremen's Act imposes exclusive liability on the shipowner-employer to its employee as distinguished from the contractual undertaking in *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp., supra,* to the ship owner. At page 320, footnote 6, it is said:

> "If the stevedore is liable in warranty for supplying defective, injury producing equipment, of course, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, . . . , are no bar to recovery. This question was fully resolved in *Ryan vs. Pan-Atlantic Corp.,* . . . 'The Act nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by bond of indemnity, or the contractor's own agreement to save the shipowner harmless.' See also *Reed* vs. *Yaka,* 373 U.S. 410 . . ."

Mr. Justice Black (who authored the majority opinion in *Reed* v. *S.S. YAKA, supra*) in his dissenting opinion in *ITALIA, supra,* reaffirmed the *exclusiveness of liability* provision, saying at page 325:

> ". . . In *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 . . . and *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 . . ., we held that the system of compensation which Congress established in the Longshoremen's and Harbor Workers' Compensation Act as the sole liability of a stevedoring company to its employees prevented a shipowner from shifting all or a part of his liability to the injured longshoreman onto the stevedoring company, the longshoreman's employer."

Mr. Justice Black then explained the exception to this rule under the *Ryan* doctrine where there is a third

person involved and the employer by contract assumes a greater burden to that third person. Referring to *Reed* v. *YAKA, Supra,* (at page 325, footnote 2) he said:

> "*Reed* v. *YAKA,* 373 U.S. 410 . . ., held only that a longshoreman could bring a suit for unseaworthiness against a stevedoring company which chartered a ship and was the longshoremen's employer. In that case no issue as to an implied warranty of workmanlike service arose because the stevedoring company had agreed in any case to hold the shipowner harmless without regard to negligence . . . ."

Reed v. *SS YAKA, supra,* has left intact the employer's immunity from suit by his employees. The liability imposed upon the employer (Pan-Atlantic) was imposed on the same principle as the liability imposed on the employer in *Ryan, supra.* The employer, by the terms of the hold harmless agreement contained in the charter party, agreed to accept the responsibilities of a third party shipowner and for that reason alone was held liable.

GENERAL EXPRESSIONS OF HUMANITARIAN POLICY DO NOT SUPPORT THE CASE AT BAR

In support of his position appellee has extracted certain phrases from their context in *Reed* v. *SS YAKA, supra,* which cannot meet the facts of his case. He cites only the broad general language of the court's opinion without proper regard for the context in which the language appeared, without regard for the relationship of the parties involved or the issue before the court for decision.

The Supreme Court in *Osaka Shosen Line* v. *United*

States, 300 U.S. 98, cautioned against such practice in the following language, at page 103:

> *"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not control the judgment in a subsequent suit, when the very point is presented for decision. Cohens* v. *Virginia,* 6 *Wheat* 264, 399; *Humphreys Executor* v. *United States,* 295 U.S. 602, 626-627". (Emphasis supplied)

At first blush, it appears that some phrases used by the majority of the court do support appellee's claim against his employer, but the language fails him when it is viewed in its context.

Mr. Justice Black, for the purpose of establishing the reason for the decision, in broad general terms cited humanitarian principles as the basis for the warranty of seaworthiness found in *Sieracki, supra,* and then for the purpose of demonstrating the parallel of the employers in *Ryan, supra, and in SS Yaka, supra,* stated at page 414:

> "In making this argument, Pan-Atlantic has not pointed and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in the one in which the owner hires an independent company. In either case, under *Ryan,* the burden ultimately falls on the company whose default caused the injury."

The case holds only that a longshoreman may assert a cause of action against his stevedore employer which

was also the charterer of the vessel. The liability imposed upon the employer (Pan-Atlantic) was not imposed as a result of any obligation it owed to *Reed* as an employer, but was imposed upon Pan-Atlantic as a result of its assuming the shipowners' responsibilities by the terms of the hold harmless agreement.

The Court viewed the charter party arrangement as an attempt to insulate the shipowner from liabilities it would have had sans the contractual arrangement. But, by the very terms of the charter party, the stevedore employer assumed the shipowner's liabilities and was therefore, held liable.

There is no evidence that appellant has done anything other than repair its own tugboat, accepting the responsibilities that flowed upon it as a single entity. Appellant has not attempted to enter into any contractual arrangements with third parties to change its liabilities.

Appellant here is not contesting an action asserted against it by virtue of its having voluntarily assumed the responsibilities of a third party. The appellant here is contesting a claim being made directly by an employee and therefore seeks the protection of the *exclusive liability* provisions of the Longshoremen's and Harbor Workers' Compensation Act to which it is entitled.

FACTS PRESENTED IN CASE AT BAR WERE DECIDED AGAINST APPELLEE'S POSITION

The question for decision in the case at bar was before the Supreme Court in the case of *Pennsylvania Railroad Co.* v. *O'Rourke,* 344 U.S. 334 (1953).

O'Rourke was a *railroad brakeman* who brought an action under the *Federal Employer's Liability Act,* 45 U.S.C. Sec. 51, and *Safety Appliance Acts,* 45 U.S.C. Sec. 1, for injuries sustained when he released a defective handbrake on a freight car which was aboard a car float on navigable waters. A summary judgment was granted, dismissing the complaint. The Second Circuit reversed the judgment. The Supreme Court reversed the Second Circuit and held that the Longshoremen's and Harbor Workers' Compensation Act applied to the exclusion of the Federal Employer's Liability Act, saying at page 338:

> "We need not, however, in this case, determine whether the car float is a 'boat' that should be regarded as in substance a part of the railroad extension. . . . It is clear that whether or not the boat is an extension of the railroad under the Liability Act is immaterial. The later Harbor Workers' Act by sections 903 (a) and 905 covered such injuries on navigable waters and made its coverage exclusive. *Nogueira* v. *N.Y.N.H. and H.R. Co., supra,* at page 130-131. . . ."

The holding of *O'Rourke* has been followed in the following cases: *Mach* v. *Pennsylvania Railroad Company,* 198 F. Supp. 469 (W.D. Pa. 1958); *Caldaro* v. *Baltimore and Ohio Railroad Company,* 166 F. Supp. 833 (E.D. N.Y. 1956); *West* v. *Erie Railroad Company,* 163 F. Supp. 879 (S.D. N.Y. 1958); *Scrinko* v. *Reading Co.,* 117 F. Supp. 603 (D. N.J. 1954). In each of these decisions the plaintiff was a railroad employee seeking a recovery under *F.E.L.A.* for injuries received in a maritime employment. In each case the plaintiff was en-

gaged in a task which was at these times considered to be "traditional seaman's work." In each case the Courts held that the plaintiff's exclusive remedy was pursuant to the Longshoreman's and Harbor Workers' Compensation Act.

If the Longshoremen's and Harbor Workers' Compensation Act will immunize a railroad owner from a cause of action granted to its employees by an Act of Congress, then certainly the same Act should insulate a shipowner-employer whose liability to its employees arises not through an Act of Congress but through the admiralty "common law."

Rationale of Reed v. S. S. Yaka Is Inapposite to a Ship Repairman

Assuming arguendo, that *Reed* v. *S. S. Yaka, supra,* is authority to permit a suit by a longshoreman against his employer-shipowner, appellant argued in a pretrial motion (Appendix, pp. 2-2c) and in its opening brief that the privilege would not extend to a ship repairman. It was there noted that the rationale of the decision in *Reed* v. *S. S. Yaka, supra,* was to give a longshoreman equal remedies whether he is employed by an independent contractor or the shipowner. It was there pointed up that the risks which befall the longshoremen attendant upon the transient nature of their employment were not shared by ship repairmen.

It was also pointed up that the stevedoring business is not a business that requires a great deal of material, equipment or facilities; that a stevedore was primarily

a labor contractor obtaining its employees from a central hiring hall only as it needs them. In contrast, a ship repairer is required to have a substantial investment in property, with yard facilities, up-to-date special machinery and equipment and usually a drydock.

There is not, therefore, the incentive to go into the ship repair business simply to escape third party recoveries by employees, as there might be for a ship owner to go into the stevedore business (Appendix, pp. 2b, 2c).

Vessel Not in Maritime Service

West v. *United States,* 361 U.S. 118 (1959) is not authority for the proposition that a vessel must be in the mothball fleet undergoing repairs in order not to warrant her seaworthiness, an appellee suggests. The case stands for the proposition that any vessel which is not in maritime service, *for whatever reason,* does not warrant her seaworthiness. In holding that the MARY AUSTIN undergoing general repairs did not warrant her seaworthiness the Court stated at page 121:

> ". . . On the other hand, the vessels involved in the cases depended upon by petitioners were, at the time of injury, . . . instead of undergoing general repairs, were in active maritime service. . . ."

The Court in *West, supra,* laid down three tests for determining whether or not a vessel is in maritime service, saying that the emphasis should be upon the vessel's status, the extensive nature of the work to be performed, and on the pattern of repairs. By the "status of the ves-

sel," the Court refers to the situation where the vessel has been formally retired from navigation as in *Roper* v. *United States,* 368 U.S. 20 (1961), and also where the vessel is physically unable to participate in maritime commerce as in *N.Y. & N.J. Pilots* v. *Halecki, Admx.,* 358 U.S. 613 (1959) and in *Gill* v. *Tancred* (D.C. N.D. Cal., 1957), 1958 A.M.C. 670. The "extensive nature of the work to be performed" has reference to the situation where the repairs require the services of a specially equipped repair yard as in *West* itself, and in *Union Carbide Corp.* v. *Goett, Admx.* (4 Cir. 1959), 278 F.2d 319. The phrase "pattern of repairs" is addressed to the question of whether or not the work being performed upon the vessel was customarily done by the ship's crew, as in *Berryhill* v. *Pacific Far East Line* (9 Cir. 1956), 238 F.2d 385 and *Halecki, Admx., supra.*

In the instant case the tug BANNOCK was docked at appellant's repair yard (Tr. 130). Her motive power was inoperative and she drew her electrical power from shore-side facilities (Tr. 13, 89, 124). In short, she was not a vessel capable of engaging in maritime service.

The repairs required the use of specialized equipment which was not carried aboard the vessel (Tr. 131, 132).

Besides, having both main engines dismantled, her rudders, drive shafts, and propellors were to be removed and replaced (Tr. 132, 133, 134) which appellee admitted was not work traditionally performed by the crew (Tr. 126).

The cases cited by appellee add nothing to his con-

tentions. It goes without saying that a vessel formally withdrawn from navigation is not in maritime service as was the SS HARRY LANE in *Roper* v. *United States, supra.*

In *Lawlor* v. *Socony-Vacuum Oil Co.* (2 Cir. 1961), 275 F.2d 599, the Court found that the work being performed was performed customarily by the crew and too, the repairs were minor as said by the Court at page 561:

> ". . . The work called for by the contract . . . was the usual large number of miscellaneous items including the finding of cracks and leaks in the tanks and repairing them. . . ."

The repairs in *Pollock* v. *Standard Oil Company of California,* (Cal. D.C. of App. 1st D., 2nd Div. 1965) 42 Cal. R. 128 were said by the Court to be the same as in *Lawlor* v. *Socony Vacuum, supra.*

The tug BANNOCK meets all three tests enunciated in *West* v. *United States, supra,* and should not be held to warrant her seaworthiness.

Negligence Count Properly Stricken

On a pretrial motion to dismiss the libel or in the alternative to dismiss the negligence count, the whole of appellee's argument was directed to a cause of action under *The Jones Act,* 46 U.S.C. 688. Not once did he intimate that he was asserting a claim under the general maritime law. Judge East properly dismissed the count under the authority of *Swanson* v. *Marra Bros., Inc.,* 328 U.S. 1 (1946). During the course of his opinion, Judge East told appellee how to affect such a claim, but appel-

lee obviously preferred not to do so. Appellee did not assert such a claim and ought not now to be heard to say that he did.

Be that as it may, appellee does not have a tort claim under the general maritime law. At common law "fellow servant negligence" was a defense and until the *Jones Act, supra,* did away with the defense as to members of the crew, negligence of a fellow employee was a defense as to all employees including crew members under the general maritime law. *The Osceola,* 189 U.S. 158 (1903); *The West Kader* (9th Cir. 1923), 1923 A.M.C. 655. *The Jones Act, supra,* does not apply to ship repairmen. *Swanson* v. *Marra Bros., Inc., supra.* All hands aboard the tug BANNOCK were appellee's fellow servants. To grant to appellee a cause of action on a tort theory would be to grant him a remedy against a shipowner not enjoyed by an employee working for an independent contractor.

One in the employ of an independent contractor whose injury was caused by the negligence of a "fellow servant" cannot maintain an action against the shipowner unless the negligence of the "fellow servant" renders the vessel unseaworthy. And even in that case, the cause of suit must be predicated upon the unseaworthiness of the vessel and not upon a negligence theory.

Appellee's contention serves to further point up the absurd results which would follow if he is allowed to prevail upon this appeal. To attempt to apply the rationale of *Reed* v. *SS YAKA, supra,* in the unique fac-

tual situation of that case to the case at bar would plainly distort the congressional intent of equality of treatment for all employees under the Longshoremen's and Harbor Worker's Compensation Act.

CONCLUSION

Appellant has no liability to appellee because the courts are not free to rewrite the provisions of the Longshoremen's and Harbor Workers' Compensation Act and make what was intended as an immunity from suits and damages no immunity at all.

The fact is that *Reed* v. *SS Yaka, supra,* involved a vessel operated by the employer but owned by a third person. It was on these facts, in accord with the *Ryan* doctrine, that the Supreme Court held the employer liable because the employer had voluntarily agreed to assume the obligations of the shipowner, the third party.

The reason for the holding in *Reed* v. *SS Yaka, supra,* was to foreclose the stevedoring employers from entering into contractual arrangements for the sole purpose of destroying the longshoremen's rights against the shipowner. Certainly it was not intended to impose liability contrary to the provisions of the Longshoremen's and Harbor Workers' Compensation Act upon a tugboat owner which has traditionally repaired its own vessels.

The facts of this case are not novel. They were before the Supreme Court in *Pennsylvania Railroad Co.*

v. *O'Rourke, supra,* and the issue was decided against appellee's contentions.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH
FLOYD A. FREDRICKSON
EUGENE D. COX
Of Proctors for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion, the foregoing brief is in full compliance with those rules.

EUGENE D. COX
Of Proctors for Appellant

APPENDIX

Summary of Argument on Motion for Summary Judgment

MR. FREDRICKSON: If the Court please, on behalf of Respondent Pacific Inland Navigation Company we would move at this time for a summary judgment in favor of Pacific Inland Navigation Company against Mr. Delbert Course.

We rely, your Honor, on the Biggs case, decided by Judge Hoffman in the Eastern District of Virginia, which is set forth in the memorandum which we have previously filed with the Court.

It is simply a question, your Honor, whether or not this man has his compensation benefits under the Longshoremen and Harbor Workers' Act or is entitled to recover in this court. All of the evidence relied upon in the Biggs case is before your Honor, and we have marked as an exhibit a certificate of insurance which shows that he had coverage under the Longshoremen and Harbor Workers' Act. I am sure there will be no dispute. Mr. Course has received compensation under the Longshoremen and Harbor Workers' Act.

Further in the pretrial order it sets out that Mr. Course is a marine electrician, not a longshoreman, a shoreside marine electrician, so that all of the pertinent and authoritative facts are before your Honor at this time so far as ruling on the motion for summary judgment is concerned.

If I might, I would like to mention to your Honor why I think the Biggs case is correct. As your Honor knows, a longshoreman, a regular longshore-

man, works daily for different employers. They are hired out of a central hiring hall. I am sure your Honor knows this from the many cases that you have tried. They work one day for Brady Hamilton, and the next day for American Mail Line and a third day for Portland Stevedore Company. Many times, as your Honor knows, the man doesn't even know who employs him, and quite properly so, because his employment is through this central hiring hall. He works one day for one employer and one day for another.

Now, in that connection, the information put out in this very beautiful booklet, "Men and Machines," by the P.M.A. and I.L.W.U. states that these men go out for different employers out of a central hiring hall, so that they do have permanent or semipermanent steady work. It is something that has been of benefit, I take it, to the whole industry.

Now, this man who goes out daily and works a different employer, says, "It is ridiculous if I work for Portland Steve, and the next day I work for American Mail Line, and it turns out that American Mail Line are on some other benefits or I don't have the same rights against American Mail Line that I would have against Portland Stevedoring Company."

The authority of Reed v. YACA, in my opinion, held that the warranty of seaworthiness would extend to a man who is working, in effect, for his employer who also owns or bareboat charters the vessel on which he is employed.

Now, contrasted with that situation is the employment of Mr. Course. As his deposition will indicate, he worked for about a year and a half for Pacific Inland Navigation Company. They maintained

a permanent or semi-permanent shipyard staff at their facilities. It is quite unlike the day-to-day change of employer that you have with a longshoreman. Mr. Course was, in effect, a regular employee of his employer, which I think is the distinguishing characteristic and explains the reasoning and basis for the Biggs case. Furthermore, Reed v. YACA says a shipowner should not be allowed to put up an economic barrier by going into the stevedoring business.

As your Honor knows, the stevedoring business is not a business that requires a great deal of material or equipment or facilities. In effect, a stevedore is simply a labor agent. He gets his employees out of a central hiring hall, brings them down to the ship, and he sells services primarily. I think you can distinguish that from the repair yard facility, where you are required to have a substantial investment in property, with yard facilities and equipment required to repair vessels.

The point I would like to make is that there is not the incentive to go into the shipyard business simply to escape third party recoveries by your employees, as there very well might be with the longshore situation, when you really only need an office or two, and you get some walking boss again out of the central hiring hall.

I think that these are the pertinent facts which explain the Biggs case, and which distinguish a longshoreman from a man, a marine electrician, who is employed by a ship repair yard, as Mr. Course was.

THE COURT: Thank you.

MR. GREEN: If the Court please, I am not sure how much of the historical background I should give to the Court. I am sure the Court is aware —

THE COURT: I think I am familiar with that.

MR. GREEN: All right. I would like to state to the Court the fact that we do not have to guess whether or not other courts have included repairmen, electricians or painters. In a case cited in the memorandum from the Fourth Circuit Court, Socony-Vacuum Oil against Lawlor, 275 Fed. (2d) 599, that is a case where the ship was in for an annual overhaul and involved quite extensive sums of money, your Honor, and the man injured was in no way related to the stevedore. He was a man supervising other persons on the job doing the repairs. And that court has held that, since this was not out of navigation and simply to be considered a dead ship, this man was protected by the same rules and rights as to unseaworthiness of the vessel as would a longshoreman.

The Supreme Court has held specifically a nonlongshoreman would have the protection of unseaworthiness in a case where the employers were separate. Then the only differentiation here is where the employer of this man is the same person that owns the ship.

In Reed v. YACA (sic) it just says that makes no difference in a longshore situation.

Admittedly, there has been no Supreme Court decision that has said whether or not it would make a difference, the fact that there was ownership of the ship and ownership of either the stevedore company or repair yard, if it was a nonlongshoreman. No Supreme Court decision has said that as yet.

Just by logic, there has been no other distinction made by the Court unless the ship is dead. That seems to be the primary distinction.

I would like to point out to the Court—it is not in the memorandum, but I will say on the record as an officer of the Court that from a telephone call this morning we found that the Biggs case is now being argued as of today in the Court of Appeals, and the lawyers there tell us that it roughly will be three months before the Court of Appeals will determine whether or not the District Court was correct.

I would like to point out one further thing in the Biggs case, your Honor. If the Court has had an opportunity to read it, you will notice that the Court was extremely unhappy, I think with the plaintiff's attorney, because that attorney had processed his claim through the Virginia compensation system, not the Federal, where he had to swear on a number of occasions under oath that he was not a seaman, had none of those rights, and so forth, and then was proceeding on this unseaworthiness doctrine.

That is not the case here. We have not sworn we have done anything other than exactly what he did. He was an electrician, and he was working on board ship at this particular time. We believe he has a right, just as a longshoreman, to obtain compensation benefits under the Longshoremen and Harbor Workers' Act, and if there is unseaworthiness of the vessel he has either a right to libel the vessel in rem and file an action or libel the vessel in personam —

THE COURT: The motion for summary judgment is denied.